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In The

SUPREME COURT OF THE UNITED STATES

October Term, 1973

No. 73-587

S. WALLACH COMPANY, INC.,

Petitioner,

v.

INTERNATIONAL BUSINESS MACHINES CORPORATION,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE NEW YORK SUPREME COURT, APPELLATE DIVISION, SECOND DEPARTMENT (Docket No. 1747 E/72)

JAMES V. JOY, JR.
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New York, N.Y. 10017

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Petitioner S. Wallach Company, Inc., prays that a writ of Certiorari issue to review the Order of the New York State Supreme Court, Appellate Division, Second Department entered in the above entitled case, Docket No. 1747 E/72, on February 5, 1973. The New York Court of Appeals denied Plaintiff's timely motion for leave to Appeal on July 2, 1973.

The Order of the New York Supreme Court, Appellate Division, Second Department, was made an entered on February 5, 1973. The Appellate Division denied a Motion for Reargument on April 4, 1973. The New York Court of Appeals denied Plaintiff's Motion for Leave to Appeal on July 2, 1973. No Petition for Rehearing of the Order of the New York Court of Appeals was filed. The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1254(1).

(This is a companion case to Rolf Topik, et al v. Catalyst Research Corporation, et al, U.S. Supreme Court Docket No. 73-127. Citations in this Petition to an Appendix will be to the Appendix in this Court of the Topik case.)

Opinion Below

The New York Supreme Court, Westchester County (per Joseph F. Hawkins, J.S.C.) granted "Accelerated Judgment," dated February 18, 1972 in an unreported memorandum, which is printed at App. D4. The New York Supreme Court, Appellate Division, Second Department, affirmed the lower court on February 5, 1973 in an order without opinion, reported at – –App.Div.2d – –, which is printed at App. D1. The Appellate Division also denied a Motion for Reargument in an Order without opinion dated April 4, 1973, which is printed at App. D3. The New York Court of Appeals denied Plaintiff's Motion for Leave to Appeal in an unreported Order dated July 2, 1973, which is printed at App. D1).

Jurisdiction

The Order of the New York Court of Appeals as aforesaid was made and entered on July 2, 1973. No Petition for Rehearing was filed. The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1254(1).

Questions Presented

Page 4 of the Petition of Rolf Topik, Doc. 73-127, is incorporated herein by reference.

Constitutional Provision and Statute Involved

The Constitutional provision and statutes involved are the Fourteenth Amendment to the United States Constitution and Article 32 and Sections 3211 and 3212 of the New York Civil Practice Law and Rules, printed in Appendix A.

Statement

Pages 11-14 of the Petition of Rolf Topik, Doc. No. 73-127, are incorporated herein by reference.

Reasons for Granting the Writ

Pages 14-29 of the Petition of Rolf Topik, Doc. No. 73-127, are incorporated herein by reference.

CONCLUSION

For The Foregoing Reasons, The Petition For Certiorari Should Be Granted.

Respectfully submitted,

JAMES V. JOY, JR.
Attorney for Petitioner
60 East 42nd St.
New York, N.Y. 10017

NEW YORK COURT OF APPEALS

S. WALLACH COMPANY, INC.,
Appellant,

vs.

INTERNATIONAL BUSINESS MACHINES CORPORATION,
Respondent.

Mo. No. 286

DECISION OF COURT OF APPEALS Jul 2 1973

Motion for leave to appeal denied with ten dollars costs and necessary reproduction disbursements.

At a Term of the Appellate Division of the Supreme Court of the State of New York, Secpnd Judicial Department, held in Kings County on February 5, 1973

HON. J. IRWIN SHAPIRO, Acting Presiding Justice
HON. FRANK A. GULOTTA)
HON. MARCUS G. CHRIST) Associate Justices
HON. ARTHUR D. BRENNAN)
HON. A. DAVID BENJAMIN)

S. Wallach Company, Inc.,
Appellant,

v.

International Business Machines Corporation,
Respondent.

Order on Appeal from Order Civil Action or Proceeding

In the above entitled cause, the above named S. Wallach Company, Inc., having appealed to this court from an order of the Supreme Court Westchester County, dated March 6, 1972; the said appeal having been argued by James V. Joy, Jr., Esq., of counsel for the appellant and by Lawrence T. D'Aloise, Jr., Esq., of counsel for the respondent, due deliberation having been had on said appeal, and upon the court's decision slip heretofore filed and made a part hereof, it is

ORDERED that the order appealed from is hereby affirmed, with $10 costs and disbursements.

Enter:

Irving N. Selkin

Clerk of the Appellate Division

___A D 2d ___ A- January 15, 1973

1747 E/72 S. Wallach Company, Inc., appellant, v. International Business Machines Corporation, respondent

Order of the Supreme Court, Westchester County, dated March 6, 1972, affirmed, with $10 costs and disbursements. No opinion.

SHAPIRO, Acting P.J., GULOTTA, CHRIST, BRENNAN and BENJAMIN, JJ., concur.

February 5, 1973 S. WALLACH CO., INC. v INTERNAT'L BUSINESS MACHINES 1747 E/72

Lower Court Opinion

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CAPTION

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HAWKINS, J.

The defendant moves for "accelerated judgment," pursuant to "Article 32 of the C.P.L.R."

In this complaint alleging slander, the plaintiff, "a corporation organized under the laws of the State of New Jersey" [sic] states that it is engaged in "developing and selling computerized data particularly to the construction industry in the form of critical path scheduling." The substance of the alleged slander is that the defendant informed an officer of another corporation that it, meaning thereby the plaintiff, stated of the plaintiff that its "critical path scheduling is unsatisfactory to the defendant IBM." The complaint then pleads by innuendo that the alleged defamatory utterances was engendered by malice and was "particularly designed to do severe economic harm to the plaintiff in his [sic] profession."

The defendant urges, firstly, that the complaint fails to state a cause of action; secondly, that there is a meritorious, affirmative defense of qualified privilege; and, lastly, justification.

The complaint does not, in my opinion, state a cause of action. For an action in slander to be maintainable, it must be slanderous, per se. If innuendo must be pleaded so as to render actionable the non-salnderous per se utterance, special damages must be pleaded and proved. (See, Seelman, *The Law of Libel and Slander* [Revised Ed., Vol. 2, Ch. XIII; also, Ch. XX, Vol. I])

Apart from the foregoing general insufficiency, upon the submission, the defense of qualified privilege, assuming the matter com-

complained to be otherwise actionable, is a complete defense. At bar, there existed such, "corresponding interest or duty" as to render the situation privileged. (*Shapiro v. Health Ins. Plan*, 7 N.Y. 2d 56.) The rationale for the genesis and persistence of this complete defense in the law of defamation is there fully considered. (see, also, *Seelman, supra*, Vol. 2, Ch. XI.)

Respecting the third defense urged by the defendant, that of justification, in view of our above consideration of the two prior affirmative defenses, I do not deem it necessary to consider same.

We note, but do not comment upon the second paragraph of the complaint, which merely alleges plaintiff's corporate status as one organized under the Laws of the State of New Jersey, but does not contain the requisite further allegations mandated by Sec.1312 of the Business Corporation Law, to wit, that it has "been authorized to do business in this state and it has paid to the state all fees,penalties and franchise taxes for the years or parts thereof during which it did business in this state without authority. This prohibition shall apply to any successor in interest of such foreign corporation."

The defendant's motion is granted.

Submit order on notice.

Joseph F. Hawkins

J.S.C.

Dated: February 18, 1972

Appearances:

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